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JOHN T. FEY, C

Supreme Court of the United States

OCTOBER TERM 1956.

No. 606

The Petition of CHARLES FRANCIS ADAMS, *et al.*, as Massachusetts Trustees of Eastern Gas & Fuel Associates, and, as such Trustees, Owners of the steamship *Melrose*, for exoneration from or limitation of liability.

Petitioners.

CHARLES FRANCIS ADAMS, *et al.*, as Massachusetts Trustees of Eastern Gas & Fuel Associates, and, as such Trustees, Owners of the steamship *Melrose*,

Petitioners,

v.

CONSTRUCTION AGGREGATES CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

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November 28th, 1956.

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IN THE

Supreme Court of the United States

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The Petition of CHARLES FRANCIS ADAMS, *et al.*, as Massachusetts Trustees of EASTERN GAS & FUEL ASSOCIATES, and, as such Trustees, Owners of the steamship *Melrose*, for exoneration from or limitation of liability,

Petitioners,

CHARLES FRANCIS ADAMS, *et al.*, as Massachusetts Trustees of EASTERN GAS & FUEL ASSOCIATES, and as such Trustees, Owners of the steamship *Melrose*,

Petitioners,

v.

CONSTRUCTION AGGREGATES CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

The petitioners above named, by their counsel, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit affirming a final decree in admiralty of the United States District Court for the Southern District of New York.

Opinions Below.

The opinion of the Court of Appeals and judgment of affirmance were filed on October 3rd, 1956 (R. 56a, 62a). Thereafter your petitioners presented to that Court a petition for rehearing, which was denied with a further opinion and order filed on November 7th, 1956 (R. 64a, 72a, 74a). The opinions of the Court of Appeals have not been officially reported. The two opinions of the District Court are reported in 125 F. Supp. 110. For convenience, the opinions of the Court of Appeals and, the opinion of the District Court on the matters relating to the question presented are appended.

Jurisdiction.

The jurisdiction of this Court is provided by Title 28 U. S. C. 1254(1), Act of June 28th, 1948, c. 646, 62 Stat. 298.

Statement.

These causes, in admiralty, arose out of a collision which occurred in New York Harbor on July 2nd, 1950, between petitioners' vessel *Melrose* and respondent's vessel *Sandcraft*.

The District Court found and adjudged respondent's *Sandcraft* 80% at fault and petitioners' *Melrose* 20% at fault, and ordered a decree awarding apportionment of the total damages accordingly, (R. 52, 54). In a further opinion after reargument, the District Court commented on the patent failure of justice involved in equally dividing damages when the relative faults are found to be clearly disproportionate, (R. 68-74). With obvious reluctance, it

ultimately felt constrained to decree an equal division of the damages, (R. 74).

The Court of Appeals, in affirming the District Court, held that the *Sandcraft's* negligence was the major cause of the collision, (R. 59a). The Court stated that the liability of the *Melrose* was not so clear, but placed contributory liability on her for want in judgment exercised by her Master in special circumstances thrust upon her by the negligence of the *Sandcraft,* (R. 59a, 61a). On a petition for rehearing, the Court of Appeals overruled petitioners' contention that the damages be apportioned in accordance with the comparative degrees of fault, (73a). The Court said:

> "In so ruling we do not disagree with the finding below that a division of the damages, 80% against *Sandcraft* and 20% against *Melrose,* would accord with the facts and the equities" (R. 73a).

In regard to the rule of equal division of property damage on findings of disproportionate fault, the Court significantly stated:

> "We have frequently called attention to the inherent injustice of this rule" (R. 73a).

The Court explained its adherence to that unjust rule in the following statement.

> "* * * But the rule of equal division of property damage is so well established in this country that it would create intolerable confusion were a court of intermediate jurisdiction such as ours to deviate from it. We shall therefore continue to apply the rule until there shall be authoritative sanction for departure therefrom" (R. 73a).

Petitioners do not question that a division of the damages, 80% against *Sandcraft* and 20% against *Melrose*, accords with the facts and the equities.

The Question Presented.

In admiralty causes involving property damage arising out of a collision between two steamers, when United States District and Appellate Courts have considered the fault of one vessel to be 80% and the other 20% (or in other unequal proportions), should not the damages be divided in proportion to the comparative faults?

Reasons for Granting the Writ.

(1) In causes of maritime collision, when faults of vessels are found to be clearly unequal, United States courts have nevertheless reluctantly felt constrained to divide the damages equally since the decision of this Court in *The Schooner Catherine et al.* v. *Dickinson et al.*, 17 Howard 170, 177-178 (October Term 1854). With increasing frequency in recent years the lower courts have stated that, when the fault is unequal, it is inequitable, irrational, and inherently unjust to divide the damages equally. Declaring preference for a division of damages in proportion to the comparative faults of vessels, the courts having refrained from applying the comparative fault doctrine until it is sanctioned by this Court. It is submitted that this Court, not having ruled upon the precise question presented by this record,—to wit: whether maritime collision damages should be apportioned in accordance with findings of comparative negligence, concurrently found by both courts below to be 80%-20%,—should now reexamine and settle

the question. The question involves an important substantive principle of Federal admiralty law which has been the subject of much comment and criticism.

(2) In a cause of maritime tort for personal injury, this Court recently sanctioned the doctrine of apportionment of liability in accord with findings of comparative fault. Review of the cause at bar would serve the important object of permitting establishment of harmony between two irrationally conflicting doctrines,—that of liability for maritime property losses due to joint faults of unequal proportions, involved here, and that of maritime personal injury similarly caused.

(3) Review of the question presented also permits reconsideration of a discredited and unfair admiralty doctrine which conflicts with this Court's concepts of equity and justice.

Supporting Contentions.

The doctrine of equal division of damages in cases of maritime collision due to mutual fault was first sanctioned by this Court in 1854. *The Schooner Catherine et al.* v. *Dickinson et al.*, 17 How. 170, 177-178. The rule so adopted was a departure from the harsh common law rule which would have barred recovery by either vessel and left the damages where they fell. In the circumstances the Court therefore regarded the rule as the "most just and equitable" one. It was approved because the same rule was at that time the settled one in the English Courts. The Court considered it one "best tending to induce care and vigilance on both sides in the navigation."

In 1876, this Court considered the rule to have been grounded to some extent on the consideration expressed by Dr. Lushington that it would be difficult to determine both the "* * * *quantum* of neglect or culpability on the one side and the other; * * *." *The Atlas,* 93 U. S. 302, 314.

In 1890 this Court ruled that a claimant for personal injury due to a maritime tort should not be barred by contributory negligence, and that this principle was "* * * in harmony with the rule for the division of damages in cases of collision." *The Max Morris,* 137 U. S. 1, 14, 15.

The present rule is to apportion the fault in personal tort. *Pope & Talbot, Inc.* v. *Hawn,* 346 U. S. 406.

The lower courts no longer consider the collision rule of equal division of damages just and equitable where the faults of the colliding vessels are in unequal proportions. They consider the rule to be inequitable, illogical, irrational, and unjust.

In *Ahlgren* v. *Red Star Towing & Transp. Co.* (2nd Cir.) 214 F(2d) 618, the Court said at pp. 620-621:

> "The admiralty rule of evenly-divided damages in cases of injury to property—although a highly desirable departure from the 'harsh' common-law doctrine which denies all relief to one suing for negligence if guilty of contributory negligence—has frequently received criticism as unfair. On that ground, virtually every country except ours has abandoned it. Nevertheless, we feel obliged to apply that rule until the Supreme Court or Congress instructs us otherwise."

The same Court also said:

> "The resultant division of damages, half-and half, is irrational and unjust. Guided by the *The*

Max Morris, 137 U. S. 1, 11 S. Ct. 29, 34 L. Ed. 586, we have held that the more rational doctrine of comparative negligence applies in the case of personal injuries." *Petition of Diesel Tanker A. C. Dodge, Inc.* (2nd Cir.). 234 F (2d) 374, 377.

In *Marine Fuel Transfer* v. *Tug Ruth,* (2nd Cir.) 231 F (2d) 319, 321, the Court said:

> "Moreover, but for the well-established but illogical rule requiring an equal sharing of the loss where both vessels are to blame, *Ulster Oil Transport Corp.* vs. *Matton No. 20* (2 Cir.) 1954 A. M. C. 426, 210 F(2d) 106, the apportionment here would be heavily weighed against the *Ruth.*"

Judge Learned Hand, in a dissenting opinion in *Ulster Oil Transport Corp.* v. *Matton No. 20, supra* at page 110, stated:

> "Is it out of place to point out that the suit is one more illustration of our strange obstinacy in clinging to the division of damages and refusing to apportion them? This has become even more egregious, when we reflect that, where personal injuries are in issue, we do follow the more enlightened doctrine, now in force in most countries."

The Court of Appeals for the Third Circuit, after assessing blame for a collision, three-fourths against one vessel and one-fourth against the other, modified the decision on its own motion, stating in *The Margaret,* 30 F(2d) 923, 928.

> "* * * Yielding to these authoritative pronouncements, this court, wholly aside from whatever views it may have on the subject, is constrained to follow the rule and in consequence change its decision to that of affirmance of the decree dividing the damages

equally in the manner which the law prescribes. The *North Star, supra.*"

The 1854 rule of equal division of collision damages no longer applies in the English Admiralty. The courts of that country since 1913 have applied the rule of comparative negligence, as have the courts of the majority of maritime nations, as a result of ratification of the Collision (Liability) Convention, Brussels, 1910. 6 *Benedict on Admiralty,* pp. 3-7 (Sixth Edition). This Treaty was not ratified by the United States because, while it affected apportionment of collision liability between the vessels involved, it also seriously affected the rights of innocent third-party claimants for personal injuries and owners of cargo.

The rule here contended for affects only the comparative liability of the colliding vessels and leaves all innocent parties with their usual rights. The equal division rule is conducive to litigation, because a vessel owner largely responsible for a disaster seizes the opportunity to make the other vessel, which is guilty of only slight blame, pay half the bill.

United States and English courts do not find any difficulty in determing the *quantum* of culpability of colliding vessels. In the case at bar, both the trial court and the appellant court agreed on assessing 80% fault against the *Sandcraft* and 20% against the *Melrose.*

The modern facility for assessing fault proportionately against colliding vessels is readily explainable. In 1884 and 1897, subsequent to this Court's adoption of the rule of equal division, Congress enacted the International Rules for Preventing Collisions at Sea, 23 U. S. Statutes at Large 438, 33 U. S. C. Sections 61-141; and, in 1897, enacted similar comprehensive statutes governing navigation of vessels on

Inland Waters of the United States, 33 U. S. C. Sections 154-232. These statutory rules lay down explicit duties and privileges of navigating vessels. Since the adoption of the statutory rules, Admiralty Courts have established a body of decisions interpreting the rules and defining the rights and duties of navigating vesels. The ready means for apportioning comparative fault are thus at hand in the present day, and the courts have given frequent expression to allocation of fault in different proportions. At the same time they express their dissatisfaction with the 50-50 rule. That result is characterized as inequitable, illogical, irrational, and unjust.

In 1908 this Court found no difficulty in dividing liability of vessels in collision as separate entities on *in rem* principles, although it placed greater liability on one owner as the proprietor of two of three vessels in fault. Comparative apportionment of faults among the entities was not sufficiently stated to reopen the question. This Court said:

> "It is said, truly enough, that if each scow has to pay a quarter, the amount with which the owners will be charged will be greater than in a personal suit where the owners all are solvent and pay each his share. But without invoking on the other side the characteristic vicissitudes of personal suits in tort, we may say that there is no injustice. Although even the admiralty does not attempt to go far in the quantification of damages, it is not an unreasonable supposition that on an average the owner of two vessels, each concurring in a wrongful result, will contribute twice as much toward producing it as if he had owned only one. * * * There is nothing stated sufficient to reopen the question, if there is one, as to changing the apportionment when there are different degrees of blame. *The Atlas*, 93 U. S. 302; *The Max Morris*, 137 U. S. 1." *The Eugene F. Moran*, 212 U. S. 466, 475-476.

In 1953 this Court established that liability in cases of personal injury due to joint maritime torts shall be assessed on a basis of comparative negligence. *Pope & Talbot, Inc.* v. *Hawn*, 346 U. S. 406, 408, 409. This Court said:

> "(a) The harsh rule of the common law under which contributory negligence wholly barred an injured person from recovery is completely incompatible with modern admiralty policy and practice. Exercising its traditional discretion, admiralty has developed and now follows its own fairer and more flexible rule which allows such consideration of contributory negligence in mitigation of damages as justice requires."

Thus the "fairer and more flexible rule" of comparative negligence is applicable to maritime injuries, but the old equal division rule still governs maritime collisions due to joint but unequal fault. A compatability found to be desirable in 1890 is now out of harmony with justice. *The Max Morris, supra.*

The reasons for the old collision rule, it will be seen, no longer exist. The adoption by this Court of the more enlightened principle of comparative negligence in maritime injury cases strongly speaks for its adoption in collision property losses caused by joint fault.

This Court has never reaffirmed the old collision doctrine by reconsideration of the question, presented by this record, that collision faults should be apportioned in accordance with the degree of faults of the colliding vessels. In the case at bar, one vessel was found to be 80% to blame and the other 20% to blame. It presents a very apt situation in which employment of the doctrine of comparative negligence would work equity and justice, and continued

enforcement of the antiquated 1854 collision doctrine would be inherently unjust.

Sanction by this Court of the comparative negligence doctrine to collision losses as between offending vessels would not adversely affect or impair the rights of injury claimants or innocent cargo against the offenders. *The Juniata,* 93 U. S. 337. The solidarity of obligation of joint tortfeasors to innocent third parties is assured by the invalidation of the Both-to-Blame Collision Clause. *United States* v. *Atlantic Mutual Insurance Co. et al.,* 343 U. S. 236.

Conclusion.

Wherefore, petitioners pray that this petition for a writ of certiorari be granted.

Charles Francis Adams, E. H. Bird, Paul C. Cabot, Charles A. Coolidge, Halfdan Lee, E. M. Farnsworth, H. S. Payson Rowe, John J. Burns, F. C. Dumaine, Jr. and Henry W. Hills, as Massachussetts Trustees of Eastern Gas & Fuel Associates,

Petitioners,

By Cletus Keating,
John F. Gerity,
Counsel.

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New York 5, New York.

November 28th, 1956.

APPENDIX.

UNITED STATES COURT OF APPEALS.

FOR THE SECOND CIRCUIT.

Before:

CLARK, *Chief Judge*, and
HINCKS and LUMBARD, *Circuit Judges*.

HINCKS, *Circuit Judge:*

Two steamships, the *Sandcraft*, a 265 foot sand dredge owned by Construction Aggregates Corporation, and the *Melrose*, a 444 foot liberty type freighter owned by Charles Francis Adams *et al.* as Trustees, came into collision in clear weather, at night, July 2, 1950, in New York Harbor. The owners of both vessels petitioned for a limitation of liability and these petitions were consolidated with a libel brought by the owners of the *Melrose* and a cross libel filed by the owners of the *Sandcraft*. From a decree holding both vessels at fault and dividing the damages, both parties appeal. The findings and opinion below are reported in 125 F. Supp. 110.

The east coast or harbor side of Staten Island is lined with piers. Intervening between Staten Island and the fairway is an anchorage area upwards of a thousand yards wide. It is conceded that the Narrow Channel Rule is applicable to the fairway. The *Sandcraft* had proceeded through the Kill Van Kull, north of Staten Island, turned right outward bound down the harbor on a 2-knot ebb tide. Shortly after this change of course, allegedly to avoid a ship coming in to anchor, the *Sandcraft* bore to its right, entered the Staten Island anchorage area and continued south within it for about a mile until a tanker, anchored in the anchorage area close by the fairway, blocked its course. The *Sandcraft* then turned left to avoid the tanker

the bow of which it cleared by only 10 feet. In so doing it gave a two-blast signal and entered the fairway with engines full speed ahead. At this point, *Sandcraft's* green light was sighted by the *Melrose,* which was proceeding inward bound on her right side of the channel. To throw its stern clear of the tanker the *Sandcraft* turned right, down channel, thereby exposing both lights to the *Melrose* which, not having heard any prior signal and assuming that a port to port passing was in order, gave a one-blast signal. The *Sandcraft* responded with a two-blast whistle and turned left, across the fairway, blocking out its red light. The *Melrose* immediately reduced speed to slow ahead. The *Sandcraft* then, rather than continuing on a port wheel until headed in an up-channel direction, leveled out on a course across the channel towards Brooklyn. When about 100 feet away, with the collision imminent, the *Melrose* gave a danger signal and reversed engines; but to no avail. Its bow struck the *Sandcraft* in the starboard stern quarter: *Sandcraft* sank within ten minutes. The entire episode, from the time when *Sandcraft* was first sighted entering the fairway above the tanker's bow until the collision, was compressed into approximately two minutes.

Judge Murphy found that both ships were at fault: the *Sandcraft* for delaying departure from the anchorage grounds and failing to continue its port wheel after her two-blast signal, and the *Melrose* for failing to reverse and sound a danger signal immediately upon hearing the *Sandcraft's* two-blast signal.

There can be no doubt that the *Sandcraft's* conduct was negligent and that its negligence was a substantial and indeed the major cause of the collision. So obvious was her fault that we think it unnecessary even to discuss the effort made by her counsel to isolate and then justify each successive phase of her conduct. Necessarily, prior phases contributed to the effect of successive phases and it would be fruitless to consider whether any single phase of its conduct, in isolation, constituted a proximate cause. We hold Judge Murphy's finding that the *Sandcraft's* faulty

navigation caused the collision is amply supported by the record.

The liability of the *Melrose* is not so clear. Judge Murphy's finding of fault was based on a supposed violation of Pilot Rule VII (now Section 80.7 of the Pilot Rules for Inland Waters)* usually known as the "starboard hand" rule. He thought the second paragraph of that rule became applicable when the *Melrose* received *Sandcraft's* two-blast signal; and that consequently *Melrose* violated that rule in failing then to sound the danger signal and reverse. Counsel for the *Melrose* point to the fact that the second paragraph of the Rule is expressly limited to cases involving "conditions covered by this situation," i.e., to the crossing situation dealt with in the starboard hand rule stated in the first paragraph, citing *Portal S.S. Co.* v. *El Isleo*, 308 U. S., 378, and our interpretation of that decision in *Portal S. S. Corp.* v. *So. Pacific Co.*, 112 F. 2d 297. He contends that this is not a "starboard hand rule" case because that rule is applicable only to vessels on well defined courses which have each other in sight at sufficient distance and in sufficient time to know what their respective courses are, citing *Erie R.R. Co.* v. *The Invader*, 2 Cir., 159 F. 2d 648; *The Cotopaxi*, 20 F. 2d 568; Griffin on Collision §42. We incline to sustain the *Melrose's* position thus far. We think it scarcely reasonable so to construe the starboard hand rule as to make it applicable to the situation here in

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* 80.7. *Vessels approaching each other at right angles or obliquely.*—When two steam vessels are approaching each other at right angles or obliquely so as to involve risk of collision, other than when one steam vessel is overtaking another, the steam vessel which has the other on her own port side shall hold her course and speed; and the steam vessel which has the other on her own starboard side shall keep out of the way of the other by directing her course to starboard so as to cross the stern of the other steam vessel, or, if necessary to do so, slacken her speed or stop or reverse.

If from any cause the conditions covered by this situation are such as to prevent immediate compliance with each other's signals, the misunderstanding or objection shall be at once made apparent by blowing the danger signal, and both steam vessels shall be stopped and backed if necessary, until signals for passing with safety are made and understood. (Formerly Pilot Rule VII.)

which *Sandcraft*, to use a mixed metaphor, was acting like a maverick loose in the harbor.

However, we think it unnecessary to make a definitive ruling as to the applicability of Pilot Rule VII. For in any event, even *Melrose* concedes the applicability of the rule of special circumstances embodied in Article 27 of the Inland Rules, 33 U. S. C. A. §212.* We think that under this rule the *Melrose* failed to show due regard to the danger of collision which arose when *Sandcraft* in emerging into the fairway turned first down-channel, apparently to effect a port to port passing, and then, crossing *Melrose's* one whistle signal, turned across the channel apparently intending either to cross *Melrose's* bow or to turn up-channel. We hold that immediately upon hearing *Sandcraft's* two-blast signal, *Melrose* should have reversed and sounded the danger signal. Its failure to do so was negligence which contributed to the collision: its conduct was not consistent with the exercise of reasonable judgment.

It is argued for *Melrose* that she was not bound to anticipate negligent navigation by the *Sandcraft*, citing *Great Lakes D. & D. Co.* v. *The Santiago*, 155 F. 2d 148, 150. But here *Melrose* had already witnessed negligent navigation by *Sandcraft*,—conduct which even *Melrose* counsel insists was negligent. We are left cold by the argument that under "the special circumstances" *Melrose* was entitled to assume from *Sandcraft's* two-blast signal that although obviously outward bound she would continue her gyration to her left to an up-channel course. The numerous cases cited for *Melrose* all fall short of supporting such a contention. Our decision in *Bouchard Transportation Co.* v. *The Providence*, 223 F. 2d 404, is not to the contrary. There a port to port passing had been agreed upon and the *Rowen Card*, whom we exonerated, instead of reversing, was using

* 33 U. S. C. A. §212. *Special circumstances requiring departure from rules.* Art. 27. In obeying and construing these rules due regard shall be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger.

her engine to get further to the starboard and thereby to decrease the hazard of collision with the oncoming *Providence.* There was no basis for a belief by *Rowen Card,* a tug, that reversal of her engine would have decreased the hazard of collision with her powerless tow which, as it developed, received the brunt of the collision.

We agree with *Melrose's* counsel that the fault of *Sandcraft* was far more flagrant that that of *Melrose.* But even so, we hold that *Melrose's* fault was too clear and substantial to bring her within the "major-minor fault rule."

Affirmed on both appeals.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT.

ON PETITION FOR REHEARING

Before:

CLARK, Chief Judge and HINCKS and LUMBARD, Circuit Judges.

PER CURIAM:

This petition, brought by the appellants Charles Francis Adams, et al., trustees, as Owners of the SS. Melrose, fails to persuade us to change our decision or modify our opinion.

The contention now made that the damages should be proportioned in accordance with the comparative faults of the colliding vessels, is overruled. In so ruling we do not disagree with the finding below that a division of the damages, 80% against Sandcraft and 20% against Melrose, would accord with the facts and the equities. However, the trial judge was plainly right in holding that prior decisions of this court required that the damages be equally divided. *Ahlgren* v. *Red Star Towing & Transportation Co.*, 2 Cir., 214 F. 2d 618, 621. We have frequently called attention to the inherent injustice of this rule. *Ahlgren* v. *Red Star Towing & Transportation Co., supra; The City of Chattanooga,* 2 Cir., 79 F. 2d 23. See also dissenting opinion of Judge L. Hand in *Ulster Oil Transport Corp.* v. *The Matton,* 210 F. 2d 106, 110. But the rule of equal division of property damage is so well established in this country that it would create intolerable confusion were a court of intermediate jurisdiction such as ours to deviate from it. We shall therefore continue to apply the rule until there shall be authoritative sanction for departure therefrom.

Petition denied.

JUDGE MURPHY'S SECOND OPINION.

UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

ON MOTION FOR REARGUMENT.

MURPHY, D. J.

On motion by respondent for limited reargument of that portion of the discussion, the findings of fact (number 10) and the conclusions of law (numbers 2 and 3) relating to the 80-20 per cent apportionment of damages, both sides appear in agreement that any division of damages upon the basis of comparative fault must be an even one. Alternatively, each side suggests application of the major-minor fault rule so as to cast all damages upon its adversary. We resist this suggestion, having found no situation where it is clear that the chief blame is on one side, while on the other there has been only some venial fault. Consequently, the choice lies between apportionment of damages according to the relative fault of the parties, found in this case at 20 and 80 per cent respectively, and equal division of damages between the parties, regardless of their relative fault. Two questions arise: (I) which ought to be the rule; and (II) which is the rule.

I

The almost uniform doctrine in civil law jurisdictions[4] of apportionment of damages has been flatly rejected by the common law largely because juries lack devices for estimation of fault in percentiles.[5] Yet the justice of appor-

[4] *E. g.*, Germany, Switzerland, France, Quebec, the Philippines and Puerto Rico. But *cf.* Mathes *v.* Schwing, 169 La. 272, 125 So. 121.

[5] See Prosser, Torts, 405.

tionment ought not to be denied for want of its precise measurement. Widespread criticism of the common law all-or-nothing rule has led to its abandonment by statute for certain cases in a few jurisdictions[6] and for all tort cases in others.[7] And in numerous federal statutes, the rule of apportionment of damages in negligence cases has been adopted.[8]

The admiralty rule urged in this case, of evenly divided damages for injury to property, owes its conception to the same rationale as that of the common law in rejecting apportionment. In adopting this rule in 1824, Lord Gifford observed that "if your Lordships were to take any other rule, one cannot conceive any mode of properly apportioning the loss."[9]

Yet there is less basis for fear of haphazard apportionment in admiralty cases where fault lies on both sides than in comparable common law situations. The trier of fact is a judge rather than the oft-maligned jury. While difficulty of precise measurement persists, the notion that in every such case the division should be in equal halves is no less capricious and arbitrary than insisting that the division be by quarters or thirds. "There may be occasions when blame is not correctly apportioned—perfection is not of this world. * * * Where the Court says one-third where it should have been one-fourth, it is a mistake of the Court:—and even the best judge is not beyond the reach of error. But where the judge, although seeing and saying that the

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[6] Va. Code Ann. §3959; Ga. Ann. Code §2781 (railway crossing accidents). See also Iowa Code §8158; Minn. Stat. §4935; Wis. Stat. §192.55 (2, 3) (railway labor acts).

[7] Miss. Code Ann. §§511, 512; Neb. Comp. Stat. §20-1151; Wis. Stat. §331.045; Brit. Col. Stat. c. 8; New Bruns. Rev. Stat., c. 143, p. 1758; Nova Scot. Stat., c. 3; Ont. Stat., 20 Geo. V., c. 27, 21 Geo. V., c. 26.

[8] Employers' Liability Act, 45 U. S. C. A. §§51-59; Merchant Marine Act, 46 U. S. C. A. §861 *et seq.*

[9] Hay *v.* Le Neve [1824] 2 Shaw 395, 404 (H. L.).

faults are not at all equal, is nevertheless compelled to make the burden of damages equal, justice fails.'"[10]

Practically every other leading maritime nation apportions damages according to relative fault in such cases,[11] including the British who abandoned their 87 year old rule of equal division in favor of the proportional one of the Brussels Convention.[12] The desirability of uniformity in maritime doctrines between this country and England,[13] is one consideration favoring the rule of proportional damages. Another more compelling one is the lack of uniformity between our judicially formulated maritime rule of proportional damages in personal injury cases and that of equally divided damages in collision cases. Judge Learned Hand has raised the question "of our strange obstinacy in clinging to the division of damages and refusing to apportion them? This has become even more egregious, when we reflect that, where personal injuries are in issue, we do follow the more enlightened doctrine, now in force in most countries."[14] And when Congress has undertaken to prescribe rules of damages in some maritime situations of fault, these have been ones of proportional and not equal division of damages.[15] The patent injustice of equal division has led to judicial straining in some cases to let off entirely the ship only slightly to blame under a major-minor

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[10] Franck, Collisions at Sea in Relation to International Maritime Law, 12 L. Q. Rev. 260, 263 (1893).

[11] See Ahlgren *v.* Red Star Towing & Transp. Co., 2 Cir., 214 F. 2d 618, 621, n. 4.

[12] Convention for the Unification of Certain Rules in the Matter of Collision, Art. IV, Third International Diplomatic Conference on Maritime Law at Brussels (1909-10); Maritime Conventions Act of 1911, 1 & 2 Geo. V, c. 57.

[13] See Standard Oil Co. of New Jersey *v.* United States, 340 U. S. 54, 59.

[14] Dissenting in Ulster Oil Transport *v.* Matton, 2 Cir., ... F. 2d ....., ..., 1954 AMC 426, 433.

[15] The Jones Act, 46 U. S. C. A. §688; 45 U. S. C. A. §§51-59; Merchant Marine Act, 46 U. S. C. A. §861 *et seq.*

fault doctrine in collisions.[16] After a half-century of application in nearly all other leading maritime nations, the rule of proportional division has been found workable, not unduly burdensome upon triers of fact and not giving rise to a multiplicity of appeals.[17]

II.

Apart from choice of the more desirable rule, the pressing question is the authoritarian one of what that rule is. Until adoption of equal division of damages in collision cases by the House of Lords in 1824,[18] there had been a question in admiralty whether the rule was not one of apportionment.[19] Apportionment seems to have been the accepted rule whenever degrees of negligence could be ascertained. Equal division originated in a mediaeval rule applicable only to cases of "inscrutable fault."[20] There appears to have been considerable vacillation between the two rules in the United States for a number of years.[21] In the oft-cited *The Max Morris*,[22] a personal injury case, collision and non-collision cases of equal division and non-collision cases of apportionment were reviewed. "Whether, in a case like this, the decree should be for exactly one-half of the damages sustained, or might, in the discretion of the court be

[16] See Extract from Report of the Brussels Conference (of 1895), 53 Albany L. J. 44, 46 (1896); Mole and Wilson, A Study of Comparative Negligence, 17 Cornell L. Q. 333, 352 (1932).

[17] See Huger, The Proportional Damage Rule in Collisions at Sea, 13 Cornell L. Q. 530 (1928).

[18] Note 9, *supra*.

[19] See Cayzer *v.* Carron Co. [1883] 9 A. C. 873, 881.

[20] Franck, Collisions at Sea in Relation to International Maritime Law, 12 L. Q. Rev. 260, 263 (1896).

[21] Griffin on Collision 564 (collision cases on apportionment to 1929 collected). See also The Firenze, D. C. E. D. Pa., ... F. Supp. ....., ..., 1940 AMC 28, 32.

[22] 137 U. S. 1. Cited as authority for apportionment, at least in personal injury situations. Pope & Talbot *v.* Hawn, 346 U. S. 406, 409; American Stevedores *v.* Porello, 330 U. S. 446, 458.

for a greater or less proportion of such damages, is a question not presented for our determination upon this record, and we express no opinion upon it."[23] Chief Justice Fuller, who had joined in this opinion, sat on circuit in *The Victory*,[24] a vessel found "grossly at fault" in collision with another merely "guilty of an act of omission." A cargo damage claim was required to be satisfied first out of the limitation value of the vessel grossly at fault, and only then by requiring the other vessel "to make up any deficiency."[25] The decision was regarded abroad as an adoption of the rule of proportional damages in collision cases.[26] On certiorari, the question of apportionment was escaped and the decision reversed on the ground that only one ship was at fault.[27] The opinion of the Supreme Court was—unusual to relate—by Chief Justice Fuller.

The rule of equal division of damages in collision cases has been referred to quite recently by the Supreme Court as "established admiralty doctrine".[28] Earlier positive announcements of the rule occurred in situations where both parties assumed that such was the doctrine,[29] or where there was "nothing stated sufficient to reopen the question, if there is one, as to changing the apportionment when there are different degrees of blame."[30]

It is true that this government has failed to ratify the Brussels Convention; yet it has been argued that such

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[23] *Id.* at 15.

[24] 4 Cir., 68 Fed. 395.

[25] *Id.* at 399-400.

[26] See Scott, Collisions at Sea Where Both Ships are in Fault, 13 L. Q. Rev. 17 (1897); Franck, Collisions at Sea in Relation to International Maritime Law, 12 L. Q. Rev. 260 (1896).

[27] 168 U. S. 410.

[28] Halcyon Lines *v.* Haenn Ship Corp., 342 U. S. 282, 284; United States *v.* Atlantic Mutual Insurance Co., 343 U. S. 236, 242.

[29] The North Star, 106 U S. 17; The Atlas, 93 U. S. 302, 319; The Catherine, 58 U. S. 170.

[30] The Eugene F. Moran, 212 U. S. 466, 476.

failure was due to a provision therein denying solidarity of obligation of joint tortfeasors to innocent third parties rather than to the rule of apportionment of damages in collision cases.[31] While Congress by statute unquestionably could adopt the rule of apportionment, the non-personal injury aspect of admiralty has been a field not occupied by legislation. "Not the least creative achievement of judicial law-making is the body of doctrines that has been derived from the brief words of the Constitution extending the judicial power 'to all Cases of Admiralty and Maritime Jurisdiction'."[32] In its most recent expression on the rule of apportionment—in a case involving personal injury—the Supreme Court used this unrestricted language: "[E]xercising its traditional discretion, admiralty has developed and now follows its own fairer and more flexible rule which allows such consideration of contributory negligence in mitigation of damages as justice requires."[33]

However, the Court of Appeals has made it clear that it is unwilling to adopt any other rule than that of equal division of damages in collision cases. "Nevertheless, we feel obliged to apply that rule until the Supreme Court or Congress instructs us otherwise."[34] Neither side in this controversy is willing to question that rule. Accordingly, this case affords no occasion for this court to adopt what it believes to be the more equitable principle in collision cases involving fault on both sides, *viz.*, apportionment of damages according to relative fault.

On this limited reargument, finding of fact number 10 is amended to read:

"The fault of the *Sandcraft* contributed to the damage of both vessels as did that of the *Melrose*."

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[31] See Robinson, Handbook of Admiralty Law 854.

[32] Swift & Co. Packers *v.* Compania Columbiana de Caribe, 339 U. S. 684, 690.

[33] Pope & Talbot *v.* Hawn, 346 U. S. 406, 409.

[34] Ahlgren *v.* Red Star Towing & Transp. Co., 2 Cir., 214 F. 2d 618, 621. See also Postal Steamship Corporation *v.* Southern Pacific (Eastern Glade-Isleo), 2 Cir., 112 F. 2d 297, 298.

The conclusions of law (numbers 2 and 3) are amended so as to read:

"2. The *Sandcraft* is liable to the extent of one-half of the damages sustained.

"3. The *Melrose* is liable to the extent of one-half of the damages sustained."

Dated, New York, N. Y., October 13, 1954.

THOS. F. MURPHY,
U. S. D. J.

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FILED
DEC 23 1956
JOHN T. FEY, Clerk

Supreme Court of the United States

OCTOBER TERM 1956

No. 606

The Petition of CHARLES FRANCIS ADAMS, *et al.*, as Massachusetts Trustees of Eastern Gas & Fuel Associates, and, as such Trustees, Owners of the steamship "MELROSE", for exoneration from or limitation of liability,

Petitioners.

CHARLES FRANCIS ADAMS, *et al.*, as Massachusetts Trustees of Eastern Gas & Fuel Associates, and, as such Trustees, Owners of the steamship "MELROSE",

Petitioners,

v.

CONSTRUCTION AGGREGATES CORPORATION,

Respondent.

BRIEF FOR RESPONDENT CONSTRUCTION AGGREGATES CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Narrow Channel Rule 6

Supreme Court of the United States

OCTOBER TERM 1956

No. 606

The Petition of CHARLES FRANCIS ADAMS, *et al.*, as Massachusetts Trustees of Eastern Gas & Fuel Associates, and, as such Trustees, Owners of the steamship "MELROSE", for exoneration from or limitation of liability,

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CHARLES FRANCIS ADAMS, *et al.*, as Massachusetts Trustees of Eastern Gas & Fuel Associates, and, as such Trustees, Owners of the steamship "MELROSE",

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CONSTRUCTION AGGREGATES CORPORATION,

Respondent.

BRIEF FOR RESPONDENT CONSTRUCTION AGGREGATES CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Opinions Below

The opinions of the Court of Appeals have not been officially reported but are printed as an annex to the Petition. The two opinions of the District Court are reported in 125 F. Supp. 110 and may be found in the record in Appellants' Appendix in the Court of Appeals, pp. 50 and 68.

The Question Presented

The question presented is, whether this Court shall deviate from its long established rule in admiralty that where, as here, a collision results from substantial faults on the part of both vessels, the damages shall be divided equally between them?

This rule, adopted and established by this Court in the case of *The Schooner Catharine, et al.* v. *Dickinson, et al.* (1854) 17 Howard (58 U. S.) 169, 177, has always been the rule in admiralty in this country and was the rule in England until changed by statute.

Both courts below held both vessels guilty of substantial faults contributing to this collision, as will be pointed out, infra.

This Court, on December 3, 1956, in *Diesel Tanker A. C. Dodge, Inc., et al.* v. *J. M. Carras, Inc., et al.*, No. 497, 1956 Term, refused to reopen consideration of this rule by denying a petition for certiorari to the Court of Appeals for the Second Circuit, which raised the identical question (see the Petition in that case, pp. 10, 16-17). This Court there did not consider the question appropriate for review. The opinion on rehearing in the District Court in this case was cited in the Petition in that case (p. 17), and the opinion on rehearing of the Court of Appeals in this case was cited and printed in full in the Petitioner's Reply Brief there.

Statement

The petitioners did not seek in the District Court such an apportionment of damages as is now prayed

for but, on the contrary, disclaimed any such contention. The District Judge first apportioned the damages on his own initiative, without argument on the point, but when the established Admiralty rule was called to his attention on rehearing, he corrected his error. Even on rehearing the petitioners did not support or argue for a modification of the rule. "Neither side is willing to question that rule" (Murphy, D. J., Opinion on Reargument, Pet. p. 23, App. 74*). Neither was the question raised by the petitioners in the Court of Appeals until after affirmance by that Court of the Final Decree of the District Court based on equal division. The question was then first raised by the petitioners in a petition for rehearing to that Court, to which respondent had no opportunity to reply.

The Case

The petitioners have failed to state the basic facts of this case which, it is here contended, must be understood before the merit of petitioners' legal arguments can be evaluated.

The "Melrose" (petitioners' vessel), a 444-foot Liberty ship, was proceeding up the Main Ship Channel in New York Harbor, above the Narrows, intending to anchor in the upper section of the Staten Island anchorage on the west side of the channel off Tompkinsville, in which only one or two ships were anchored near the edge. The lower section of the anchorage

* Appendix to Appellants' Brief in the Court of Appeals is cited thus. Pages in Appendix to Brief of Appellee in that court are numbered 1a, etc. and will be here cited as, for instance, App. 1a.

off Stapleton was nearly fully occupied. The "Sandcraft" (respondent's vessel) bound out, on leaving the Kill van Kull, found herself obstructed by a vessel which proved to be anchoring at the upper end of the Tompkinsville anchorage. In order to avoid this vessel she was forced to deviate from the channel course and pass down inside through the area designated for anchorage, as she could lawfully do, interfering with no anchored vessel, paralleling the channel.*

After passing inside one or two anchored vessels, the "Sandcraft" turned out to reenter the channel. In doing so she had to avoid being set down by the strong ebb tide on the tanker "Republic", which had just anchored off Pier 16 (App. 38) in the position marked X on the chart. As she began her turn she saw the "Melrose" coming up and blew her a two-blast signal (App. 34a), indicating she would turn to the left and cross the bow of the "Melrose". This signal was heard on the "Republic" (App. 39) but not on the "Melrose" (App. 4a). Being set down by the tide toward the "Republic", the "Sandcraft" had no choice but to continue out into the channel across the "Melrose" course.

Though the "Sandcraft" was in plain view at all times, those on the "Melrose" did not see her until her bow crossed that of the "Republic" (App. 3a, (4a). The "Melrose" then blew a one-blast signal for a port-to-port passing. The "Sandcraft" immediately replied with a second two blast signal and continued perforce with her announced intention to

* A diagram on a section of a chart, attached to the Petitioners' (Appellants') Brief in the Court of Appeals, is attached hereto for the information of the Court.

cross the bow of the "Melrose". The "Melrose" did not reply to this signal, either with assent (two blasts), dissent (one blast), or danger signal (four or more short blasts), and her silence was taken for assent. Sensing no danger (App. 11a, 18a), the "Melrose" did not stop or reverse her engines, but merely slowed them from half to slow speed (App. 7). Miscalculating her speed (App. 6a, 19a) she continued until collision was inevitable, when seconds before the collision she reversed her engines and blew the danger signal. In spite of the failure of the "Melrose" to cooperate, the "Sandcraft" nearly went clear, but was hit a heavy blow forty feet from her stern, sustaining severe damage from which she sank.

The Decisions Below

Both Courts held the "Melrose" guilty of substantial fault contributing to the collision for failing to stop and reverse her engines promptly (Pet. 15; App. 52). The Court of Appeals added that she should have blown the danger signal as well as stopped and reversed "immediately on hearing 'Sandcraft's' two blast signal" (Pet. 15). The Court of Appeals was "left cold" by the argument that the "Melrose" was entitled to assume that the "Sandcraft" would continue to turn to her left "to an up-channel course" (Pet. 15).

Implicit in the findings of the Courts below is the fact that the "Melrose" was at fault in failing to keep a good lookout because of failure to see the "Sandcraft" sooner or hear her first two-blast. The Court of Appeals in affirming the decree below was

not called upon to consider this point. Moreover, the time interval of two minutes from the time the "Sandcraft" was seen across the bow of the "Republic" until the collision, found by the Court of Appeals (Pet. 13), places the collision well on the westerly side of the channel and convicts the "Melrose" of violating the Narrow Channel Rule.* All the "Melrose" contributory faults are substantial and statutory. *The Pennsylvania* [1863], 19 Wall. (86 U. S.) 125, 136.

The "Sandcraft" was held at fault only for leaving the anchorage when and as she did, and for not turning "up-channel" to avoid the "Melrose" (App. 54, 66; Pet. 13). The "Sandcraft" was forced to turn back into the channel when she did by the anchoring of the tanker "Republic", and if she had attempted to turn up channel by using more left rudder than she did she would have thrown her stern to the right causing the collision to occur sooner and with greater force. Both Courts failed to appreciate that ships do not steer like cars. Left rudder throws the stern to the right without any immediate effect on the bow. It is only after proceeding several lengths that the bow gains ground to the left. Knight, *Modern Seamanship* (11th Ed., p. 294).

The collision would not have occurred if the "Melrose" had acted in accordance with her statutory duties as found by both Courts. Her negligence in not stopping and in continuing her speed "continued

* 2 minutes at maximum average of 9 knots = 1800 feet, less 2 lengths of "Sandcraft" lacking 40 feet or 490 feet = 1310 feet, less distance of "Republic" outside channel, 300 feet = 1010 feet, or maximum distance of collision from westerly edge of the channel. Width of channel over 3000 feet.

to operate as an efficient cause" until the moment of collision. *Lie* v. *San Francisco etc., S. S. Co.* [1917], 243 U. S. 291, 299. There is no rational basis in the facts and findings for holding that the "Melrose" clear faults contributed less to the collision than did the faults found to have been committed by the "Sandcraft."

Argument

The rule of equal division of damages in collision cases where both vessels are at fault has always been the rule in admiralty in this country, and in England as well (from the time of the crystallization of the conception of liability based on fault), until changed by statute.

This rule was adopted and declared by this Court to be the law in this country in *The Schooner Catharine et al.* v. *Dickinson et al.* [1854], 17 Howard (58 U. S.) 169, 177. It was there pointed out that this was the rule which had theretofore prevailed in the district and circuit courts. It was also pointed out that the same rule was "well settled" in the English admiralty.

The rule of equal division of damages in cases of mutual fault has been reiterated by this Court frequently from that day to this:

The John Frazer [1858], 21 How. (62 U. S.) 184, 195;

Union S. S. Co. v. *New York etc.,* [1860], 24 How. (65 U. S.) 307, 313;

The Maria Martin [1871], 12 Wall. (79 U. S.) 31, 43;

The Continental [1871], 14 Wall. (81 U. S.) 345, 355, 361;
The Sapphire [1873], 18 Wall. (85 U. S.) 51;
The Sunnyside [1875], 1 Otto. (91 U. S.) 208, 215;
The Atlas [1876], 3 Otto. (93 U. S.) 302, 319;
The North Star [1882], 16 Otto. (106 U. S.) 17, 20;
The Manitoba [1886], 122 U. S. 97, 111;
The Max Morris [1890], 137 U. S. 1, 8-13;
The Chattahoochee [1898], 173 U. S. 540, 551-555;
The Eugene F. Moran [1908], 212 U. S. 466, 474, 476;
White Oak Co. v. *Boston etc. Canal Co.* [1921], 258 U. S. 341, 345;
Halcyon Lines v. *Haenn* [1951], 342 U. S. 282, 284;
U. S. v. *Atlantic Mutual Ins. Co.* [1951], 343 U. S. 236, 238.

In the *Maria Martin, supra,* this Court said equal division is "the settled rule of law", p. 43. In the *North Star, supra,* the doctrine was traced back to the Rules of Oleron and the laws of Wisbuy, p. 21. In the *Max Morris, supra,* the rule was restated and 21 prior decisions of the court applying the rule were cited, pp. 8, 9. The English cases establishing the same rule in England were there also reviewed. In *Halcyon* v. *Haenn, supra,* this Court said that the "rule is of ancient origin and has been applied in many cases" (p. 284). In *U. S.* v. *Atlantic Mutual, supra,* the rule was stipulated by counsel here appearing for petitioner (p. 238). The rule was not questioned in this case until after affirmance by the Court of Appeals of the District Court's equal division.

In *Bull Steamship Company* v. *Manchester Merchant* [1929] (C. C. A. 3), 30 F. (2d) 923, the Court of Appeals erroneously apportioned fault contrary to the rule, but corrected its error on rehearing, p. 928. This Court denied certiorari, 279 U. S. 862.

The rule of equal division in collision cases is so ancient, deeply embedded, and fundamental in the admiralty law of this country that we submit that if it is to be changed, it should only be changed by legislation, the course adopted in England in 1911.* (Petition, p. 8). In the legislative halls appropriate consideration could be given to such questions as the desirability of a change from the point of view of all the interests concerned, vessel owners, passengers, cargo owners, underwriters and others. There it would also be appropriate to consider such matters as the effect of a change in the rule on incentives to care in navigation and on safety of life at sea, on the encouragement of litigation, in placing additional burdens on the courts, and also the desirability of coincidentally providing technical assistance to the courts in the form of the equivalent of the English Nautical Assessors, sometimes referred to as the Elder Brethren, who are impartial professional experts, appointed to advise the judges sitting in Admiralty on technical matters of navigation and seamanship. See Marsden on Collisions, 10th Ed., p. 302.

The rule of equal division is a wise and salutary rule. In the *Schooner Catharine, supra,* this Court said that the rule is "the most just and equitable" and "best tending to induce care and vigilance on both sides, in the navigation".

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* Maritime Conventions Act, 1911, 1 & 2 Geo. 5, c. 57.

What was said by this court there as to the incentive to care in navigation is probably of even greater importance in this day of large, high power, high speed vessels. Collisions between such vessels are serious matters, involving not only heavy property loss, but the persons and very lives of large numbers of passengers and crew. The rules of navigation have been codified, and agreed upon internationally, as pointed out in the Petition. It is of the utmost importance that they be strictly enforced and that the sanctions applicable when they are violated, or when the standards of care set up by them are not met, should be sufficiently important to insure the utmost diligence on the part of shipowners in selecting officer personnel, in training and instructing them, and in requiring of them the highest degree of care in navigation. The importance of rules of liability in enforcing the mandates of the statutes is the basis of the rule that negligence which is a statutory violation is presumed to be contributory, established in *The Pennsylvania, supra,* 19 Wall. (86 U. S.) 125, 136.

The rule is just and equitable to the parties. In a collision case the owner and vessel are not liable at all, even if there is negligence in navigation, unless the court finds that that negligence definitely contributed to the collision, and was not minor or venial. The shipowner has the protection of the major-minor fault rule, invoked by both parties in both courts below. That rule is that where the fault of one vessel is clear and adequate to account for the collision, that vessel will be held to blame and reasonable doubts as to the propriety of the conduct of the other will be resolved in its favor. *The City of New York* (1893) 147 U. S. 72, 85; *The Oregon* (1895) 158 U. S. 186, 204; *The Victory* (1897) 168 U. S. 410, 423. Once

this point has been passed, and both vessels held guilty of faults contributing to the collision, it is established as was said in *Lie* v. *San Francisco, etc.* (1917) 243 U. S. 291, 299, that "the negligence of each continued to operate as an effective force" down to the moment of collision. This being true, the wisdom of a Solomon is required to say that the fault of either operated more effectively than the other.

Undoubtedly the difficulty of making a fair and equitable apportionment other than an equal division was a consideration in the establishment of the rule in the minds of Dr. Lushington in *The Milan,* Lush. Adm. 388, in the minds of the Honorable Lords of the House of Lords in *Hay* v. *LeNave,* 2 Shaw Sc. App. 400, and their successors who maintained the rule until the Maritime Conventions Act, 1911, as well as in the minds of the learned Justices of this Court in the *Schooner Catharine, supra,* and their successors for over 100 years. Is it to be considered that the trial justices of today are wiser, more competent in matters of navigation of the day, or that they have more time to give to the careful weighing of technical considerations involved in the management and navigation of ships, necessary to a fair, equitable and just apportionment of fault and liability other than an equal division? The careful analysis of the complicated factors involved in a collision case involving modern ships and conditions of navigation would obviously increase the burdens of conscientious judges as well as subject them to more extensive importunate arguments of zealous counsel.

It is said that the Maritime Conventions Act of 1911 in England has worked well and that the ad-

miralty judges there have successfully apportioned fault and liability in collision cases since that act became effective. It is true that the English judges have asserted their prerogatives under that act from time to time. Assuming that their performance has been satisfactory, major differences exist between conditions of litigation in collision cases in England and those existing in this country.

In the first place collision cases in England are tried almost entirely before the Justices of the Probate and Admiralty Division of which there are usually no more than three. Each of these Justices tries a substantial number of collision cases every year and acquires a very considerable degree of technical knowledge of ships, navigation, and the causes of collisions. They are specialists to a considerable degree. In the second place, the English Judges are assisted in the trial of collision cases by the Nautical Assessors, professional and experienced navigators, who sit with and assist the trial judge at the trial advising him on questions of seamanship and navigation. Marsden on Collisions, 10th Ed. p. 302. The advice of the Nautical Assessors is frequently referred to and relied upon by the judges in their decisons.

On the contrary in this country a very high percentage of the approximately 250 District Judges in the United States, each of whom is a potential trier of collision cases, have had very little experience or knowledge of such cases, and have not had the opportunity of acquiring any degree of familiarity with the management and navigation of ships. Even in the Southern District of New York, where many important collision cases are tried, the 18 District Judges sitting

in rotation have the opportunity of sitting in admiralty trials only occasionally. Important collision cases have sometimes been tried before a judge of long experience and high reputation who has never before encountered such a case or even been on shipboard as a passenger. Such judges are obviously at a disadvantage. It is enough to ask of them to apply general principles and reach conclusions as to contributing fault without asking them to make fine distinctions as to degrees of fault. This is especially true where they do not have the benefit of the advice and assistance of independent and impartial nautical experts as the English judges do. Under the circumstances in collision cases we submit that the rule of equal division is fairer to all and more satisfactory.

A change in the rule to allow apportionment of fault and liability in various degrees would encourage and increase litigation and appeals. This is the considered judgment of counsel for the respondent after long experience in this field. A high percentage of collision cases are disposed of by amicable settlement. The present rule is an incentive to such settlements, since the knowledge that a finding of contributory fault will result in an equal division of damages requires serious consideration of the very real hazards in the alternative of litigation. Parties and their counsel tend strongly to overestimate the merits of their respective cases and to ask for terms better than their situations warrant. If the door is opened to low appraisals by the courts of relative fault and liability the incentive to settlements would be seriously relaxed. Parties would be inclined to hold out for low percentage settlements and to assume the risks of a trial if their terms were not met. Appraisals of relative fault are largely matters of personal opinion

with parties, as well as judges. A new element of uncertainty and dispute would be introduced encouraging differences of opinion. New grounds for appeal would be provided. The consequent delays in the disposition of collision cases would seriously prejudice those who suffer losses, particularly those innocent of any fault, passengers, crew men, cargo owners etc.

The present rule has worked well. There is no general dissatisfaction with it. The Brussels Collision Convention 1910, incorporated in the British Maritime Conventions Act, 1911, modifying the rule of equal division in the English courts has met with general disfavor in this country and has not been ratified after forty-five years. It has been disapproved by repeated actions of the Maritime Law Association of the United States. While it is true that that Convention contains other objectionable provisions, including abolition of the rule of joint and several liability of joint tort feasors to innocent parties for property damage and substituting the rule of liability proportionate to degree of fault, the Convention could have been ratified with reservations on such points. No movement towards such action has ever been inaugurated.

Modification of the rule of equal division by this court would certainly be interpreted as support for the Brussels Collision Convention, 1910, in substantial part and afford substantial encouragement to those who would promote the ratification of that Convention *in toto*. It would be only a step further to curtail the rights of innocent parties, seamen, passengers and shippers, against joint tort feasors by adopting the rule of liability proportionate to degree of fault. Consideration of these matters, of the conflicting

rights of the various interests, of the effects of a change in the rule on safety of life at sea, on litigation, on the courts, as well as consideration of the desirability of supplying technical assistance to the courts such as provided to the English courts to fulfill their added responsibilities, presents a field of debate peculiarly within the scope of Congressional deliberation. *Halcyon Lines* v. *Haenn Ship Corp* (1951) 342 U. S. 282, 286; *United States* v. *Atlantic Mutual Insurance Company* (1951) 343 U. S. 236, 242.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Chart

(PHOTOPRINT)

[*For convenience of Court and Counsel photoprint is bound in on the opposite page.*]